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Supreme Court, U.S.
FILED

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No. (1)

In The
Supreme Court of the United States

Natalia Volkova,
Petitioner,

v.

Michael B. Mukasey, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress has provided deference to decisions made by the Executive Office for Immigration Review, decisions made by both the Board of Immigration Appeals and Immigration Judges, in deportation and removal proceedings. However, these decisions must be supported by substantial evidence based on the record as a whole. On appeal, an agency decision must be overturned if the record compels a reasonable fact finder to conclude that an individual is eligible for the relief sought. Immigration and Nationality Act § 242(b)(4)(B).

The issue presented deals with the lower court's gross departure from the accepted and usual course of judicial proceedings. Specifically, the lower court's blind conclusion that the agency considered the entire record before it despite evidence to the contrary; failure to properly weigh the evidence before the Immigration Judge and apply the law to the facts to reach the correct decision that, on this record, a reasonable fact finder would be compelled to conclude that the applicant is eligible for the relief sought; failure to rectify agency violations of Petitioner's due process rights; and streamlining in a case of this magnitude, all constitute a gross departure from accepted judicial proceedings and require the oversight of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Natalia Volkova, respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in her case.

OPINIONS BELOW

The October 24, 2007, opinion of the court of appeals (App., *infra*, 1a-4a), case number 05-74570, is unreported. The July 5, 2005, decision of the Board of Immigration Appeals (App., *infra*, 5a-6a), case number A72-674-520, is unreported. The May 24, 2004, decision of the Immigration Court (App., *infra*, 7a-38a), case number A72-674-520 is unreported.

JURISDICTION

Although the opinion of the Ninth Circuit Court of Appeals was entered on October 24, 2007, Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc with the Ninth Circuit. The petition for rehearing and suggestion for rehearing en banc was denied on January 8, 2008. (App., *infra*, 39a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The Immigration and Nationality Act ("INA"), as amended, governs an individual's applications

for asylum and withholding of removal; governs deportation and removal proceedings; and governs judicial review of agency decisions. See, e.g., INA §§ 208, 240, 242; 8 U.S.C. §§ 1158, 1229a, 1252.[1] The general provisions of the INA, as such law governs these subjects, are involved in this matter.

STATEMENT

This lower court's and agency's handling of this case reveals a gross departure from the accepted and usual course of judicial proceedings. Despite a standard of review that favors upholding the agency decision, the evidence presented at Petitioner's limited hearing on changed country conditions compels the finding that she is eligible for asylum. The lower court, in failing to reach this conclusion, abdicated its review role and compounded agency violations of Petitioner's due process rights.

First, the lower court blindly concluded that the agency considered all evidence submitted by Petitioner, yet the record clearly contradicts such conclusion. The agency's failure to consider all evidence before it constitutes a violation of Petitioner's due process rights to a full and fair hearing. The lower court's decision has compounded such violations and must be rectified.

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[1] All citations to INA sections will initially include their corresponding United States Code sections. Thereafter, they will be referred to only by their INA numbers.

Second, the lower court abdicated its review role when it 1) failed to properly weigh the individualized evidence presented at Petitioner's hearing; 2) failed to address and rectify due process violations of Petitioner's rights when the IJ overstepped the limited purpose of the hearing; and 3) streamlined its review of Petitioner's case by cancelling oral argument and then failing to address all elements of Petitioner's appeal.

Because the lower court's handling of Petitioner's case grossly deviated from the accepted and usual course of judicial proceedings, because similar handling of other asylum cases may adversely affect the lives of countless asylum applicants, and because the Ninth Circuit's decision in Petitioner's case in plainly wrong, review by this Court is necessary and warranted.

A. Factual and Procedural Background

Petitioner Natalia Volkova ("Petitioner") fled the former Soviet Union and sought asylum relief in the United States because of severe persecution she suffered in Ukraine and Estonia on account of her Pentecostal religion. Petitioner suffered severe discrimination throughout her childhood from her classmates, their parents, and her teachers. As petitioner grew older, such animosity manifested itself in the form of physical violence and threats. Government officials also prevented Petitioner from freely practicing her religion. She

fled to the United States in 1993 and sought asylum.

At her first hearing before the Immigration Court in 1996, the Immigration Judge found past persecution. The government did not appeal this finding; thus, it is conclusively established that Petitioner suffered past persecution on account of her Pentecostal religion. However, the Immigration Judge then found that, as the Soviet Union had collapsed, country conditions had changed significantly so as to rebut the presumption of future persecution. The Immigration Judge then denied Petitioner's applications for relief.

Petitioner timely appealed to the Board of Immigration Appeals ("BIA"). After the BIA denied her appeal, her former counsel failed to timely file a petition for review. Working with a friend, Petitioner filed a writ of habeas corpus with the U.S. District Court. The court granted the writ and ordered the BIA to reissue its decision so that Petitioner could timely file a petition for review. The Ninth Circuit affirmed the District Court's order. Dearinger, ex rel. Volkova v. Reno, 232 F.3d 1042 (9th Cir. 2000).

Petitioner timely filed a petition for review with the Ninth Circuit. While such was pending, she filed a motion to reopen with the BIA based on new evidence of country conditions in Ukraine for Pentecostals. The BIA denied the motion, and

Petitioner timely filed a petition for review of that decision. After the Ninth Circuit consolidated the two cases, it remanded Petitioner's case for a new hearing on the limited issue of changed country conditions.

B. Proceedings Below

Appearing before a new Immigration Judge, Petitioner and the government had the opportunity to present new evidence regarding current country conditions in Ukraine for Pentecostals. Petitioner presented the testimony of five individuals (herself, her three sisters from Ukraine, and a pastor from Ukraine, the latter four having all recently received refugee status in the United States because of their Pentecostal religion); the expert affidavit of Mr. Yuriy Shvets; and articles on the plight of Pentecostals in Ukraine. The government submitted Department of State country reports; website printouts; and articles of Pentecostals in Ukraine and Russia.

The Immigration Judge found that churches are thriving in Ukraine and that Petitioner did not meet her burden of establishing fear of future persecution in Ukraine on account of her Pentecostal religion. The Immigration also found that Petitioner did not establish past persecution. Petitioner timely appealed to the BIA. The BIA summarily affirmed the Immigration Judge's decision.

Petitioner timely filed a petition for review with the Ninth Circuit Court of Appeals. After extensive briefing, Petitioner's case was scheduled for oral argument on October 19, 2007. Two weeks before the scheduled argument, the panel decided the case was suitable for decision without argument. On October 24, 2007, the panel denied the petition for review.

Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, highlighting the legal and factual errors in the panel's decision as well as the panel's continuation of the agency's violations of Petitioner's due process rights. On January 8, 2008, the panel denied the petition for rehearing.

REASONS FOR GRANTING THE PETITION

A. Review Is Warranted Because The Decision Below Is Clearly Incorrect And Reveals The Panel's Gross Departure From Usual Judicial Proceedings.

This Court's review of the lower decision is necessary because the Ninth Circuit plainly erred in not only its handling of petitioner's case but also in its factually erroneous decision. The court's procedural errors constitute a fundamental misunderstanding of its duty as a judicial entity of last review by right. These errors, which involve a streamlined review of petitioner's appeal, will

have profound effects on many, if not all, subsequent asylum cases pending in the Ninth Circuit.

The Ninth Circuit's gross departure from the accepted and usual course of judicial proceedings, amounting to further violations of Petitioner's due process rights, constitutes an issue of grave importance that warrants this Court's review, especially in light of the serious and dire consequences at issue in petitioner's case.

1. The lower court blindly concluded that the Immigration Judge relied on all evidence despite clear indications to the contrary in the record.

In her briefing to the Ninth Circuit and in her petition for panel rehearing and suggestion for rehearing en banc, Petitioner first identified and then highlighted as error the lower court's acceptance of the Immigration Judge's statement that she had considered all evidence in making her decision.

In so accepting the Immigration Judge's conclusory statement that she had considered all the evidence, the lower court had cited Larita-Martinez v. INS, 220 F.3d 1092, 1095-96 (9th Cir. 2000) for the proposition that, absent contrary evidence, the Court presumes that the agency considers all evidence in the record. However, in the instant case, the record clearly provides

evidence to the contrary and supports Petitioner's argument that the Immigration Judge failed to consider, and ultimately ignored, the expert affidavit of Mr. Yuriy Shvets.

Nowhere in the exceedingly detailed, 17 page decision of the Immigration Judge is the expert affidavit of Mr. Shvets[2] identified, mentioned, referred to, or relied upon. Yet, the Immigration Judge spent 10 of 13 pages of substantive findings specifically detailing witness testimony and documentary evidence submitted by the parties. The lack of detail regarding the expert affidavit, in fact a complete omission of the expert affidavit in her decision, is strong evidence that the Immigration Judge wholly ignored the expert's affidavit in deciding Petitioner's case.

This strong evidence in the record overcomes the Lartia-Martinez presumption cited by the lower court and supports Petitioner's argument that the Immigration ignored the expert's

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[2] Mr. Shvets's expert affidavit addressed several issues wholly relevant to Petitioner's specific pleas for relief: 1) he discussed the plight of Pentecostals in Ukraine, noting that Nationalism is on the rise and the Pentecostal faith is seen as a "destructive totalitarian cult"; 2) he discussed the plight of Pentecostals in Sevastopol, where Petitioner and her family lived; and 3) he impeached the evidentiary value of the State Department reports. The insight provided by Mr. Shvets would have and should have assisted the Immigration Judge in finding that Petitioner was eligible for asylum based on worsened country conditions.

affidavit. The lower court's failure to properly apply its own precedent constitutes clear error.

Ignoring key evidence in the record is gross error on the part of the Immigration Judge, the BIA by its summary affirmance, and the lower court by its failure to recognize the fact that the Immigration Judge did not consider all of the evidence in the record in making her decision. Review is only meaningful if it takes into consideration the entire record as a whole. By ignoring Mr. Shvets's affidavit, all three entities violated Petitioner's due process rights to a full and fair hearing.

2. The lower court abdicated its vital review role when, in applying the standard of review and precedential case law to the evidence in the record, it failed to reach the one conclusion that Petitioner is eligible for asylum.

The lower court held that substantial evidence[3] supported the Immigration Judge's finding that country conditions in Ukraine have not worsened and that Petitioner did not establish fear of future persecution on account of her Pentecostal religion. However, in light of applicable law and based on

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[3] Pursuant to INA § 242(b)(4)(B), substantial evidence is required to support an agency's factual determinations. See also INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). .

the evidence in the entire record, the lower court's holding is clearly erroneous.

Once an asylum applicant establishes past persecution, a presumption of future persecution arises[4] which the government may only rebut by submitting evidence of changed country conditions individualized to the applicant's specific situation. See Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1074 (9th Cir. 2004). Significantly, "information about general changes in the country is not sufficient" to rebut the presumption. Ali v. Ashcroft, 394 F.3d 780, 788 (9th Cir. 2005) (quoting Del Carmen Molina v. INS, 170 F.3d 1247, 1250 (9th Cir. 1999)).

Petitioner's specific situation embodies a Pentecostal who attended a non-registered church in Ukraine. Because the issue of changed country conditions is so very fact dependent, Petitioner provides the following description and analysis of the evidence submitted to the Immigration Court by the respective parties.

Evidence Submitted by the Government:

The government submitted four State Department Reports: Country Reports on Human Rights Practices for Ukraine, 2002; International Religious Freedom Report for Ukraine, 2003;

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[4] 8 C.F.R. § 208.13(b)(1).

Background Note: Ukraine, 2003; and World Factbook for Ukraine.

Ninth Circuit precedent teaches that when past persecution is established, generalized information from a State Department report on country conditions is not sufficient to rebut the presumption of a well-founded fear of future persecution. See Molina-Estrada v. INS, 293 F.3d 1089, 1096 (9th Cir. 2002). These reports do not provide a sufficiently individualized analysis of country conditions relevant to the applicant's specific situation. These reports are not substantial evidence.

The government also submitted unofficial documentary evidence: two websites on religious demographic statistics; article on Pentecostals in Russia; and an article written by Pentecostal pastor in Ukraine. Again, none of this evidence constitutes an individualized analysis. The websites mention various religions in general and do not differentiate between registered and non-registered churches. The article on Pentecostals in Russia is wholly irrelevant to Petitioner's case as she is deportable to Ukraine. Finally, the Pentecostal pastor who wrote the article is not from Petitioner's city nor does the article indicate if his church is registered or not. These pieces of information are not substantial evidence.

Evidence Submitted by Petitioner:

First, petitioner submitted her own testimony; the testimony of her three sisters, recent refugees from Ukraine based on their Pentecostal faith; and the testimony of the family's pastor in Ukraine, also a recent refugee. The witnesses' testimony was highly relevant and individualized to Petitioner's asylum pleas as all four witnesses attended the same non-registered church in Sevastopol.

Petitioner also submitted evidence that five individuals (the four witnesses and Petitioner's father) all received refugee status as late as April 2003 because of their Pentecostal religion. It is inconceivable that the government, on the one hand, grants refugee status to Pentecostals in Ukraine on facts identical to Petitioner's situation and yet attempts to allege a fundamental change in circumstances on the other.

Finally, Petitioner submitted the expert affidavit of Mr. Yuriy Shvets. Please refer to footnote 3, supra, for the content for Mr. Shvets's expert affidavit.

With all of this evidence before her, the Immigration Judge nevertheless chose to rely on generalized accounts from websites and State Department reports rather than on specific testimony of Pentecostals who suffered persecution for attending Petitioner's non-

registered church and on the affidavit of Mr. Shvets, a qualified expert on religious issues in the Ukraine (evidence not even mentioned in the Immigration Judge's decision).

Despite delineation of each piece of evidence before the Immigration Court both in Petitioner's opening brief and her petition for rehearing, and similar to the above exposition, the lower court still reached the erroneous conclusion that substantial evidence supported the Immigration Judge's decision. When the applicable law is applied to the facts and evidence in the record as a whole, a reasonable fact finder is compelled to conclude that substantial evidence did not support the Immigration Judge's decision and that Petitioner is eligible for asylum. Any holding to the contrary is plainly wrong.

The lower court's errors of fact in its review of Petitioner's eligibility for asylum constitute a gross departure from the accepted and usual course of judicial proceedings. Such departure requires review by this Court to correct the significant errors committed by the lower court.

3. *The lower court has compounded agency violations of Petitioner's due process rights by affirming a decision in which the Immigration Judge overstepped the limited purpose of the hearing.*

In her petition for panel rehearing and suggestion for rehearing en banc, petitioner highlighted as error the fact that the Ninth Circuit failed to rectify the Immigration Judge's overstepping of the limited purpose of the second merits hearing by making an affirmative finding that Petitioner did not establish past persecution.

In 2003, upon review of Petitioner's consolidated first and second petitions for review, the Ninth Circuit affirmed the denial of asylum based on changed country conditions but remanded for a limited hearing on the current status of country conditions in Ukraine for a Pentecostal who attends a non-registered church. After Petitioner's second merits hearing on this limited issue, the Immigration Judge grossly overstepped the bounds of this limited hearing and issued a finding that Petitioner did not suffer past persecution in Ukraine. Such a finding blatantly contradicts the 1996 finding that Petitioner did suffer past persecution because of her Pentecostal faith. As the government did not appeal this earlier finding, such finding is conclusively established.

Because the BIA summarily affirmed the Immigration Judge's decision, including the finding of no past persecution, and because the lower court denied Petitioner's petition for review and petition for rehearing, Petitioner's immigration file now contains contradictory findings regarding past persecution. This turn of

events is yet another ridiculous by-product of the inept handling of Petitioner's asylum case, a case that has been pending for over 15 years. This inept handling, constituting a gross departure from the accepted and usual course of judicial proceedings, must be rectified, and warrants this Court's review.

4. The Ninth Circuit's "streamlining" in a case of this magnitude is a gross departure from the usual course of judicial proceedings.

Petitioner's asylum case, now encompassing a span of 15 years, two merits hearings, two BIA appeals, a motion to reopen, a U.S. District Court decision, and three Ninth Circuit decisions, is one of significant magnitude. The Ninth Circuit's "streamlining" approach to Petitioner's most recent petition for review denied her full and impartial judicial review and constituted a gross departure from the accepted and usual course of judicial proceedings.

Although the court had extensive briefing before it, it properly recognized that oral argument would provide necessary and beneficial exposition of these important issues. Oral argument was scheduled for October 19, 2007.

Thereafter, the panel assigned to this case inexplicably decided that the case could be decided without oral argument. This decision was made

on October 2, 2007, two weeks before the oral argument.[5] On October 24, 2007, the panel dismissed petitioner's case in a two and one-half page, unpublished decision. As argued above, the panel's decision wholly failed to provide meaningful and complete review of the whole record and failed to rectify the Immigration Judge's violation of Petitioner's due process rights. This handling of petitioner's case cannot be suffered.

BIA streamlining has been held to be constitutional precisely because further federal review is available. If the circuit courts are permitted to themselves engage in streamlining, such action will eliminate this fundamental safeguard. Such action is even more harmful because of the serious findings and circumstances at issue in Petitioner's case. The courts of appeal represent the final review by right for an asylum applicant. If these courts are permitted to streamline their review of agency findings and decisions, gross injustice will continue to be inflicted upon asylum applicants.

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[5] The exact same procedural handling was imposed in two other cases on which undersigned was attorney of record. After canceling oral argument, the Ninth Circuit cursorily dismissed those individuals' appeals. Once is an anomaly. Twice is a coincidence. Three times, as well as such action in countless other cases, and the Ninth Circuit is streamlining its caseload to the detriment of asylum applicants.

B. This Issue Is Of Substantial Practical Importance And Will Affect Many Asylum Applicants.

The issues identified above are of substantial practical importance that will affect many asylum applications in the Ninth Circuit and that merit this Court's review.

As argued above, the lower court's handling of Petitioner's case has resulted in continuing violations of her due process rights to a full and fair hearing and full and meaningful review by right. The lower court's failure to properly evaluate the record before it and failure to properly apply established law to the facts in the record are also cause for concern, especially in light of the fact that the Ninth Circuit's case load includes a multitude of asylum appeals. Finally, the lower court's distressing choice to streamline its review of asylum appeals is perpetuating an extreme injustice on asylum applicants.

The Ninth Circuit's gross departure from the accepted and usual course of judicial proceedings is apparent not only in Petitioner's case but in the Ninth Circuit's handling of many, if not all, of the immigration cases before it. Thus, the Ninth Circuit's improper actions make such issue one of substantial practical importance that affects many asylum applicants and warrants this Court's review and action.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this writ of certiorari be granted.

Respectfully submitted.

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March 2008

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED October 24, 2007

NATALIA VOLKOVA,

Petitioner,

v.

PETER D. KEISLER,**
Acting Attorney General,

Respondent.

Cathy A. Catterson,
Clerk
U.S. Court of Appeals
No. 05-74570

INS No. A72-674-520

MEMORANDUM[6]

[6] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Peter D. Keisler is substituted for his predecessor, Alberto R. Gonzales, as Acting Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

On Petition for Review of an Order of the Board of Immigration Appeals

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Argued and Submitted October 19, 2007[**]
Seattle, Washington

Before: **D.W. NELSON, BEAM**[***], and **RYMER**, Circuit Judges.

Natalia Volkova, a native of the Ukraine, petitions for review of the Board of Immigration Appeals ("BIA") order affirming the Immigration Judge's (IJ) denial of her application for asylum and withholding of deportation. Volkova, a Pentecostal Christian, first applied for asylum in June 1993, on the basis of religious persecution. Although the IJ in that proceeding found that Volkova had shown of history of past religious persecution in the Ukraine before the dissolution of the Union of Soviet Socialist Republics, he also found that there had been a substantial change in circumstances since that time and that Volkova no longer had a well-founded fear of future

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** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

persecution. On this basis, the IJ denied her application, and we affirmed that denial in 2003.

Volkova filed a motion to reopen her application, arguing that conditions in the Ukraine have deteriorated for members of her religious group since the first hearing on her application. The BIA reopened Volkova's deportation proceedings and remanded to the IJ to consider whether country conditions had worsened for Pentecostal Christians in the Ukraine since the earlier hearing. The IJ found there had been no material deterioration in the treatment of Pentecostal Christians in the Ukraine and denied Volkova's application for asylum and withholding of deportation once again. On appeal, Volkova contends that he IJ erred in finding there has not been a material change in country conditions since the earlier hearing.

We have jurisdiction under 8 U.S.C. § 1252, and review the BIA's ruling denying asylum and withholding of deportation under a substantial evidence standard. Li v. Ashcroft, 378 F.3d 959, 962 (9th Cir. 2004). We will reverse the agency's decision "'only if the evidence presented ... was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed.'" Id. (alteration in original) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)). Where the BIA affirms the IJ without opinion, this court reviews the IJ's decision as it would the BIA's decision. Id. at 961. We deny the petition.

The IJ was not compelled to find that country conditions had worsened for Pentecostal Christians in the Ukraine since Volkova was denied asylum and withholding of deportation. The evidence adduced at the hearing showed no material deterioration in the treatment of Pentecostal Christians in the Ukraine since Volkova's earlier hearing. To the contrary, Volkova's own witnesses' testimony established that members of her church in the Ukraine are able to attend services several times a week and regularly perform missionary work, and that the membership of her church has increased in recent years. The IJ's analysis of the evidence was adequately individualized to Volkova's situation. See Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1074 (9th Cir. 2004).

Volkova's assertion that the IJ ignored the testimony of her witnesses and the affidavit that she presented is without merit.[7] The IJ's order contains a detailed discussion of the evidence and indicates that the IJ considered the materials Volkova submitted. See Larita-Martinez v. INS, 220 F.3d 1092, 1095-96 (9th Cir. 2000) (holding that, in the absence of contrary evidence, the agency is presumed to have considered all of the evidence).

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[7] Although the parties also discuss in passing how the IJ allocated the burden of proof, we do not consider it here because the issue was not exhausted below. See Vargas v. U.S. Dep't of Immigration and Naturalization, 831 F.2d 906, 907-08 (9th Cir. 1987).

Because Volkova failed to demonstrate eligibility for asylum, the IJ also did not err in concluding that she failed to make the more stringent showing required to qualify for withholding of deportation. Halaim v. INS, 358 F.3d 1128, 1132 (9th Cir. 2004).

PETITION FOR REVIEW DENIED.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A72 674 520 – Seattle Date: July 5, 2005

In re: VOLKOVA, NATALIA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tsiprin, Elena E.

ON BEHALF OF DHS: Robert Peck, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the alien is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS), and in the event of failure to depart, the alien shall be deported as provided in the Immigration Judge's order.

/s/
FOR THE BOARD

U.S. DEPARTMENTOF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

UNITED STATES IMMIGRATION COURT

SEATTLE, WASHINGTON

IN REMOVAL PROCEEDINGS

File No.: A72 674 520 – Seattle
Date: May 24, 2004

In Re.: VOLKOVA, Natalia,
Respondent

CHARGE: Section 241(a)(1)(B) INA – Non-immigrant who remained longer than authorized

APPLICATIONS: Asylum, Withholding of Removal, and Relief under Article III Convention Against Torture

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Herman, Recor, Araki, Kaufman
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Bellevue, WA 98004

On Behalf of Homeland Security:
Robert F. Peck
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1000 Second Avenue
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Seattle, WA 98104

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 51-year-old unmarried female, a native of the U.S.S.R. and a citizen of Ukraine. The Respondent entered the United States on May 20, 1993, as a Class B non-immigrant visitor for pleasure. She was authorized to remain in the United States until November 19, 1993. She applied for asylum on June 22, 1993. This application was denied by the Asylum Office and the matter was referred to the Immigration Court on October 12, 1995.

The Immigration Court denied asylum and withholding of deportation but granted voluntary departure by decision dated October 10, 1996. The appeal taken from this decision was dismissed by the Board of Immigration Appeals (BIA) on August 12, 1997. A timely appeal was not taken to the Ninth Circuit Court of Appeals. Thereafter, a habeas action was brought in U.S. District Court, which challenged the effectiveness of the Respondent's counsel. The District Court directed the government to reissue the order of deportation so the Respondent could perfect an appeal; this action was affirmed in the Ninth Circuit. The deportation order was reissued April 17, 2001.

The Respondent filed a Motion to Reopen which was denied by decision dated July 1, 2002, for failure to support the motion with new facts to be proved and evidentiary materials. On March

10, 2003, the Ninth Circuit ruled the Respondent could submit evidence of changed country conditions. The BIA remanded the matter to this Court with instructions to consider changed country conditions, as well as evidence regarding the refugee status of family members.

The exhibits of the record of proceedings include:

Exhibit 1	Order to Show Cause – Issued October 12, 1995
Exhibit 2	Request for Asylum in the United States
Exhibit 3	Profile of Asylum Claims and Country Conditions for Ukraine
Exhibit 4	Country Conditions for Estonia
Exhibit 5	Government's Notice of Evidence – produced for original hearing in 1996
Exhibit 6	Government's Prehearing Statement - produced from original hearing in 1996
Exhibit 7	Oral Decision of Immigration Judge
Exhibit 8	BIA Decision - dated August 12, 1997
Exhibit 9	Decision of Ninth Circuit
Exhibit 10	Decision from BIA restarting time for appeal
Exhibit 11	Motion to Reopen
Exhibit 12	BIA Decision
Exhibit 13	District Court decision - dated March 10, 2003
Exhibit 14	BIA Remand - July 31, 2003

Exhibit 15	Ukraine Profile of Claims and Country Conditions
Exhibit 16	Respondent's Prehearing Statement
Exhibit 17	Respondent's Prehearing Statement (Witnesses expected to testify)
Exhibit 18	Government's Memorandum and Exhibits in Response
Exhibit 19	Supplement to Respondent's Prehearing Statement
Exhibit 20	Government's Notice of Evidence and Notice to Produce

At the hearing held on January 26, 2004, the Respondent testified to the statutory requirements for relief from deportation in the form of asylum and withholding of deportation. Other witnesses who appeared on her behalf were Vitaly Gabrilovsky, Yelena Vaylova, Tatyana Storozhenko, and Lubov Gabrilovskya.

STATEMENT OF THE LAW

Asylum and Withholding of Removal

An applicant for asylum or withholding of removal bears the evidentiary burdens of proof and persuasion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); 8 CFR 208.14, 242.17(c).

An applicant for asylum must meet the statutory definition of a "refugee", which is defined

as an individual who is unwilling or unable to return to his country of nationality (or if having none, the country in which he last habitually resided) because of past persecution or because he has a well founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A).

To establish that his fear is well-founded, the applicant must show that it is both subjectively genuine and objectively reasonable through credible, direct, and specific evidence which demonstrate that he possesses a belief of characteristic a persecutor seeks to overcome in others by means of punishment or some sort, the persecutor is aware or could become aware that he possesses this belief or characteristic, the persecutor has the capability of punishing him, and the persecutor has the inclination to punish him. Mogharrabi, supra.

An applicant for withholding or removal must demonstrate a clear probability of persecution on account of one or more of the statutorily enumerated grounds. INS v. Stevic, 467 U.S. 407 (1984). The Court in Stevic held that the "clear probability" standard requires a showing that it is more likely than not that he would be subject to persecution.

The Supreme Court has held that the terms "well founded fear" and "clear probability" are

significantly different, and that burden of proof required to establish eligibility for asylum is lower than that required fro withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

The term "persecution" has been defined to include infliction of suffering or harm upon those who differ in a way regarded as offensive. Acosta, supra. The Board in Acosta also noted that persecution could consist of economic deprivation or restrictions so severe that they constituted a threat to an individual's life or freedom, but also stated that generally harsh conditions shared by many other persons did not amount to persecution.

An applicant for asylum who has established past persecution is presumed to have a well-founded fear of future persecution unless a preponderance of the evidence establishes that since the time the persecution occurred, conditions in his country of nationality or last habitual residence have changed to such an extent that he no longer has a well-founded hear of being persecuted if he were to return. See 8 C.F.R. section 208.13(b)(1)(i).

Where, however, the applicant who has established past persecution has been determined not also to have a well-founded fear of future persecution under 8 C.F.R. section 208.13(b)(2), the application for asylum will be denied unless it is determined that he has demonstrated compelling reasons for being unwilling to return to

his country of nationality or last habitual residence arising out of the severity of the past persecution. See 8 C.F.R. section 208.13(b)(1)(ii).

SUMMARY OF EVIDENCE

Testimony of Respondent

The Respondent, Natalia Volkova, lives in Everett, Washington. She was born in the Soviet Union, in Crimea. That area of Crimea is currently a part of the country of Ukraine. She lived in the Ukraine from the time of her birth until 1981. She has also lived in Zhdanov, which is also located in the Ukraine. It is approximately eight hours from the Crimea. She lived in Zhdanov for five years. She moved there when she was twenty four years old. She left Zhdanov and moved to Estonia. While she was living in Zhdanov, she practiced the Pentecostal faith.

She left the Ukraine in 1981 because in Zhdanov there was a persecution of the believers who belonged to the Christian evangelist faith. They checked the correspondence and made fines. When she left the Ukraine, she moved to Estonia. In 1981, one did not need a visa to go to Estonia because it was still a part of the Soviet Union. She was married at the time and her husband moved to Estonia with her. They lived there until 1993. During the time she lived in Estonia, she practiced the Pentecostal faith. She had problemsthere.

She left Estonia in 1993 because when Estonia separated from the Soviet Union, it was impossible to live if you were a Russian speaking person. They kicked them out and told them to get out and it was impossible to find jobs and impossible to live there. During the time they lived in Estonia, they never obtained resident status or citizenship. They were registered there, a process/term called propiska. She cannot return to Estonia to live because she does not have citizenship.

She has never lived in the Russian Republic. She identified the three women in the courtroom as her sisters.

Upon cross-examination, the Respondent stated she is still married. Her husband was deported. She does not know where he currently is. She has not lost contact with him; sometimes she calls him. He does not have a place of residence. He stays with various people and informs her where to call him. These various houses are in different cities in Russia. This is the country to which he was deported. He was born in Krasnodar region, a part of the Soviet Union. She believes this is now in Russia. She does not know if he is now able to practice is religion there. He is a Pentecostal.

When asked whether she knows if he is able to attend church there, she stated she thinks he attends church meetings where he stays. She thinks the people who take him in are fellow

members of the Pentecostal church. From her understanding as a Pentecostal, her husband was being taken in because he was also a Pentecostal. When asked whether he has indicated that he has suffered any harm because of his Pentecostal belief after returning to Russia, she stated that over there they continue to oppress the Pentecostal church – there is no freedom for Pentecostal believers. When asked again, whether her husband has suffered himself because of his faith during his time in Russia, she stated he told her that there is no freedom for the Pentecostals. The church which her husband attends is not registered, it is considered an illegal church, that is why the church is persecuted.

When asked whether all the churches in all the cities he has been attending in Russia were under the same circumstances, she stated only the church that they attend is not registered. When asked again whether all the churches in all the cities her husband is living in as her husband moves around are unregistered churches, she stated they were all not registered. When asked whether she knew if any Pentecostal churches are registered in Russia, she stated she did not know.

She was asked what Pentecostal church she attended in Ukraine, and stated she went to a non-registered church that would usually get together at different places. She stated there was not a name of the church because it was not registered. She testified that she lived in Estonia

from 1981 to 1993. In 1993, she got an invitation and a visitor's visa to come to the United States. From 1981 to 1993, she did not have any contact with the Ukraine. She returned to the Ukraine from 1981 to 1993, she returned to the Ukraine to visit family on vacations.

She has several sisters who have come to the United States. She was asked what church they attended before they came to the United States from Sebastopol. She stated they attended church, but it was not registered. Their pastor moved here and now lives in Centralia. When asked whether she would agree with the statement that there are Pentecostal churches that are registered in the Ukraine, she stated she cannot tell about all the other churches, but the one that her sisters attended was not. She has no idea whether there are any Pentecostal churches that are registered.

When asked whether she has heard of the All Ukranian Union of Chirstians of Evangelical Faith, she stated that she has not. When asked whether it would surprise her that the government of the Ukraine reported that an association of Ukrainian evangelicals has 854 registered parishes in the Ukraine, she stated that she does not know about all the other churches. She wanted to tell the Court about her religion which was not registered, and was under persecution. According to another report, there are 1400 Evangelical churches in the Ukraine. When she was asked whether maybe some

Pentecostals were able to practice their faith, she stated that there are different churches they are talking about. Some churches have been registered, but her church has not been registered and since her church is not registered, she would not be able to practice her religion there.

When she was confronted with a statistic that stated there were 90,000 members of the Evangelical Union, and whether she thought that would mean that there were some Pentecostals who were able to practice their faith, she stated that her whole life she has attended a not registered church. Her sisters who came here also attended a non-registered church. The pastor of this non-registered church was persecuted by officials. Now she cannot attend a registered church because she has attended a non-registered church her whole life.

When she was confronted with a report from a website called "followthefire," where it appears that a Pentecostal organization held a religious crusade in Kiev during July of this year, and reports that 119 new people indicated on a questionnaire that they wanted to join the Pentecostal church, and that the first ever youth conference for the United Pentecostal church was held in Kiev just prior to the crusade, and further reported that these young people assisted in street evangelization, and whether that would suggest that at least one Pentecostal church was active in Kiev, and whether she thought she could attend a

Pentecostal church of that nature, she stated that she believes that everything he is talking about is for show that only shows one side of the situation. She referred again to the pastor who had escaped and would not allow them to have meetings. She questioned the government's counsel whether or not he was sure that it was true.

She was asked about another website involving the activities of a Pentecostal church in Izmale in the Ukraine, Odessa region, that was able to publish their reports in safety. When asked if there was some reason to believe that this church was not similar to what she believed in, she stated that she just recently has information that in the city of Voronezh during the evangelization they beat up the pastor and the police tied him and did not let him have a religious meeting. There was no freedom for her church, it was always persecuted, and she simply does not believe all the information that was published.

Testimony of Vitaly Gabrilovsky

The witness, Vitaly Gabrilovsky, currently lives in Centralia, Washington. He is a member of a religious organization. He is an Evangelical Christian, a Pentecostal. He does not presently hold a leadership position in this organization. In Sebastopol, he was a pastor of the church. He served in this capacity in Sebastopol for the last fifteen years.

He is acquainted with the family of Vasily Yorushinko. He knows Natalia Volkova. He knows her three sisters, they were members of their church.

He arrived in the United States last year in the second part of August. He obtained a visa to come to the United States from Moscow, which granted them refugee status. His church in the Ukraine is not registered with the government of the Ukraine. It is not registered because there are orders and regulations which are against the biblical truth, and the testament of the bible. Members of his church have not attempted to obtain registration because they did not get an agreement between the members of the church. Most of the members were against registering, some did not care. In his opinion, if their church were to apply for registration it might be granted.

Today, members of his church are able to practice their faith without problem. What is going on now with Pentecostal Christians in the Ukraine, during his last one and a half years in Sebastopol as a pastor, they tried to provide an evangelic meeting in the city. They put a big tent, for about 500 people, at first they provided religious services, but the next day, the Eastern Orthodox priest came to their tent and during the services, the priest started to say that they were a sect and were sectarians. He and his church put fliers out on the pillars, and the priest and his church put on their fliers which told everyone to

be careful because the Pentecostals were sectarians. After that, the police arrived and loosened an electrical circuit breaker on the pillar of the tent so that they could not use electricity, and took the oldest members of the church to the police station to question them as to why they were having this sort of service, in essence to close down the service.

This was not the only case of disruptions. Six months later they tried to provide a religious service a second time. This time, the officials of the government forbid them to put the tent in the central part of the city. He believes that all this came from the Eastern Orthodox because the city officials and the Eastern Orthodox were all friends. They were allowed, however, to put their tent up in the suburban area of the city. They were able to have their meetings, but it was with great difficulty. The police came over and started asking a lot of questions to try to disrupt the service, but finally they sent some of the elders to the central administration and they were finally permitted to provide the service, albeit with great difficulty.

Referring to the time the elders were taken to the police station, they were there about one day. There was a conversation and negotiation between them and the police in order to provide the service. As a result of this conversation, they were allowed to have the service and they were not bothered by the police again.

He does not know if this situation is happening in other cities. It definitely happened in Sebastopol but whether it occurred in other places, he is unsure. The legislation and law of Ukraine guarantee religious freedom to everyone. It is actually only on the papers, because there is a real tension and tendency against the protestant churches and protestant believers. There are a number of articles in newspapers that you can find and read. The nature of these articles is always the same – that a protestant religion is a foreign religion and it is a floating of all those agents and religions into their country – it is always against any protestant churches.

He decided to apply for refugee status in the United States, because he predicted and saw all the oppression and pushing from the Eastern Orthodox Church. He also had a great fear that his government would return tot the policies it had before. When asked if Natalia Volkova were to return, whether she would be able to freely practice her religion, he stated that he cannot tell about that because he just stated that everything that has happened, and he believes there is not such freedom for Pentecostal members to be free in their belief, even though the law in Ukraine guarantees this, it does not exist.

When asked to give other examples of members of his church who have been hindered because of the practice of their religion, in the last two years that he was in the Ukraine, he stated that he does

not have a specific example or situation that he can tell. One member of his church was killed. He does not know if it was a coincidence that this member was a Pentecostal, or if it was because she was a Pentecostal.

Upon cross-examination, the witness stated he has been the pastor of a church in the Ukraine for the past fifteen years before coming here. His church is a part of a larger Pentecostal union, it is called the Non-registered Brotherhood of Pentecostal Churches. There are approximately 50,000 members of the association and the archbishop of this church lives in the city of Krivoy Rog. He is a general supervisor of this union. The brotherhood maintains an educational program to educate its ministers at a school in the same city.

His congregation had a membership of around 300. The members met for regularly scheduled religious services each week. They would meet two times during the week, and at 10:00 every Sunday morning. They rented a club at the Mussom where they provided their services three times a week. They encouraged persons, other than the 300 members, to come to the meetings. They brought the word of God to the people, and told them about salvation. That was the way the brought members into the church. They did not have too many problems. Sometimes the city administration would have to use the club, and if there was a conflict, they could not use the facility. The facility belonged to a factory, but if there was

some kind of events in the city, i.e., an election, and they needed the facility for election events, they would not be able to use the facility.

He arranged to get a tent to have meetings on two occasions. The purpose of these meetings was to encourage new persons to come and learn about their faith and to explain and bring them to the word of God, and have these people repent. There are a lot of people addicted to drugs, some daughters and sons of members of the church. After they worked with the church and repented and corrected themselves, they stopped using drugs. The goal of these meetings were to encourage persons to repent.

They paid money to rent the land they had their tent on. They also paid for sanitation services. The government required them to have a permit in order to have these services. They were able to successfully solve this problem with the police. When the Eastern Orthodox was interfering with their services, they had to go to the higher city authorities in order to keep the police from interfering with their services. He cannot remember exactly when the Orthodox priest came to protest, it was either at the end of the first day, or at the beginning of the second day. They had planned to have the tent up to hold meetings for ten days. On the second day nothing was accomplished because the police turned the power off. On days three through ten, however, they were able to complete their tent mission

without problems. During these days, there were some people who were under the influence of alcohol who stated that only the Eastern Orthodox church were the real church and that they were sectarians. During these services a lot of people repent themselves, after, however, not many people came to the church. When they were forced to have their tent meetings at the suburban, remote location, it effected the number of people who came into the meeting because that region was not that densely populated.

When he made arrangements to come to the United States, his community selected a new pastor. They elected six people, two of them to act as pastors, and four as deacons. He has contact with them. He calls them and he writes them and they socialize over the phone. Yesterday he talked with the pastor of the church. They say that things are going on just like normal. They said the number of persons in the church have continued to increase.

Referring to negative discussions about Pentecostal churches in the newspapers, he stated that it is not just Pentecostal churches, but all the protestant churches. The paper said that Russia was baptized 1000 years ago and that their religious roots lie in the Eastern Orthodox church and not in these new protestant churches. Referring to articles which talk about the Autocephalous Ukrainian Church and the Ukrainian Kyiv Patriarchy, he stated he did not

see such articles in the newspapers, he has heard that there is a disagreement between the various religious organizations, but he did not see it himself. Referring to articles where the Orthodox church criticizes the Eastern Rite Catholic Church. He does not know about these, but when they had a convention in the city of Vinitca, Ukraine, with the Pentecostal Brotherhood churches, there was a Pentecostal bishop from Georgia, and he told them that in Georgia there was a problem with the Pentecostal churches to the same extent as in the Ukraine. The church services and missionary services have a problem with the police and must therefore meet in some places, but not in the cities.

Referring to other newspaper articles which are critical of his church, he stated they were in a city newspaper, but the article was written by an Eastern Orthodox priest. He has never seen an article written by a Pentecostal pastor in that paper.

The government brought the witness's attention to a website on which the minister there says he is a Pentecostal and addresses the Eastern Orthodox church as the "dead Orthodox church." When asked whether the witness thought this was a common description of the Eastern Orthodox church by Pentecostals, he stated it has been written, "don't judge anyone, and you won't be judged." When asked whether some Pentecostal ministers say some unkind things about the

Orthodox faith as well, he stated that he has to bring the evangelism to the people and to bring the word of God to the people and that is how you correctly and truthfully believe in God. When asked if when he explained the way to bring the word of God to the people he ever sometimes said that the Orthodox church is wrong is now they believe or in how they worship, he said that in his entire life it might have happened sometimes that this opinion has been said in private, but never in public.

Upon re-direct, the witness stated that since the year 2000, he believes a lot of members of his church, thousands, have been granted refugee status in the United States from the Brotherhood.

Upon questioning by the Immigration Judge, the witness stated even though so many members of his church are being granted refugee status, his church is continuing to grow. Now there is a smaller amount of new members. It is not the same as it used to be before, when the door of freedom was open. He had approximately 300 members in 2000. Now, there are about 320 members in the church. Approximately ten members have been granted refugee status from his congregation.

Upon re-cross, the witness stated from the thousands that have been granted refugee status, they all come from the entire Pentecostal

population of the Ukraine, not just from the Brotherhood Union.

Testimony of Yelena Vaylova

The witness, Yelena Vaylova, lives in Everett, Washington. She belonged to church in Sebastopol. They did not have any name. It was not registered, it was simply the church of evangelic faith, a Pentecostal church.

She came to the United States on March 15, 2000. She has not been back to the Ukraine. While she was in the Ukraine, she was not able to practice her Pentecostal faith freely. She was always under persecution since her childhood. They were put under fines and her mother was called by KGB. She was made fun of in school.

Directing her attention to the one or two years before she came to the United States, she stated that church was always under persecution. They were hated and were made jokes of. They were always under persecution. Their names were written down and they were fined at their work, and at school. Before she came to the United States, she was working at a company called Ascheriba (phonetic). The Eastern Orthodox church has temples and their church has nothing. The Eastern Orthodox hate them, they hook at them like they are some sort of American of foreign faith. At work they always called her "believer" and joked and gossiped and talked about

you behind your back. The neighbors as well, when someone came over to her place for meetings, the neighbors would look out and talk about "believers." She never received a promotion at work. She did not receive promotions because they told them that all pathways and roads were cut down because they were sectarians and she should not put her nose anywhere. In the last two years before she came to the United States she did not have an indication of what kind of job to apply for. She was not a member of Kosomol organization and to study anywhere you have to be a member of this organization.

Natalia should not return to the Ukraine, because they are from the family of believers and all their names are with KGB. In the case of the Communist party who took over the government, the persecution will be much worse than it used to be and they have all the information about them.

Upon cross-examination, the witness, Yelena Vaylova, was asked whether the church community she was a part of in her last two years in the Ukraine had weekly church meetings. She stated that they usually posted a day and time and they had gospels and bringing the word of God to the people. When asked whether the church had a facility it rented and had church meetings in three times a week, she stated that they did. In the beginning their church got together in private houses, but they were not registered, after, they registered the facility because there were a lot of

people in the church and they could not accommodate them in the private house. She was unsure of the number of persons in the church, she believed it was less than 300.

When asked whether she was able to attend these church services in the last two years before she came to the United States, she stated that they had the facility and then they did not want to rent it anymore, so for a while they did not have group meetings. During this time they would get together in small groups and meet in people's houses. They would have to schedule these meetings at night because they did not want the neighbors to see them get together.

When asked about when the church lost its facility and had to find a new one, s he stated that she could not remember exactly when it occurred. She was sked to estimate the year when they got together in these small groups, and stated it was around 1998.

Referring to her application to come to the United States, in which she said she suffered mockeries and had articles in the newspapers published against her faith and when this occurred, she stated that the neighbors called the police and the police came over and interrupted the meetings and took her mother to the station and she was always made fun of at school because the students hated them.

She completed her schooling in 1973 and has been married since 1983. When she was asked whether she had ever had a religious service at her home, during the time when she has lived with her husband, that has been interfered with, she stated that in 1989 or 1990 her neighbor called the police and the police came and told her that they had better stop. When asked if she has ever had a problem at her home since 1990, she stated that since 1990-91, they started to rent a facility to have services in, so there was not a problem with having meetings in someone's house or apartment. If they had, she maintains, the neighbors would have called the police.

She was employed as a cleaning woman in her last job in the Ukraine. From 1974 to 1989, she had this job. She did not have employment after 1989. Her husband had a job and supported her. Thus, the insults and people talking behind her back at work all occurred before 1989 at which time she became a full time housewife.

Testimony of Tatyana Storozhenko

The witness, Tatyana Storozhenko, lives in Everett, Washington. She came to the United States in January 2001. She has not been back to the Ukraine since then. During the last two years that she was living in the Ukraine, the officials interfered with the missionary services. When asked to explain, she stated that they interfered with the services and did not let them provide the

services. The people who were interfering were government officials. They disconnected all their equipment. She was located out in the villages when this happened. She was in the village named Krasniak. She was performing missionary services in the villages. There were about six people with her. They were traveling in a car. They had equipment with them that consisted of musical equipment, guitars and mixers. They were attempting to sing to the people. The government officials approached them during the services. They did not permit them to have the service, they were told to get their things together and go – which they did. There were three officials. They were in civilian clothes. They identified themselves. She does not remember who they said they were. They showed her identification. She does not remember when this happened. They traveled often and were on the road very much.

If Natalia has to return to the Ukraine, she thinks they will start an Eastern Orthodox movement and the communists will take over power and government and there will be a persecution.

Upon cross-examination, the witness stated that she went to religious services three times a week during the two years before she went to the United State. These happened in a rented club. They had no trouble with these services. The church did sponsor larger events where they

rented a tent. She used to go out with other members of the church to encourage other people to join. She calls this "evangelization." During the two years before she left, these evangelization trips occurred every Sunday. As a result of the evangelization activities, she and her friends attracted some people to the church. As she went out every Sunday for two years, only during the summer time, she went out perhaps thirty times but she did not count. She does not remember the number of times that when she went out, that she was prevented from giving the musical performances, or from sharing the faith, but she knows that it did happen a couple of times.

Testimony of Lubov Gavrilovskaya

The witness, Lubov Gavrilovskaya, lives in Everett, Washington. She came to the United States in January 21 or 22, 2001. She has not been back to the Ukraine since she arrived in the United States.

She was not always allowed to practice her Pentecostal faith freely in the Ukraine during the two years before she arrived in the United States. She explained that they were not liked by people. You could not invite people into your house for a bite or a drink because they were always watching you and looking at you. She explained further that they were not watching them, but they were against them somehow. In Sebastopol, when they had a gathering, an Eastern Orthodox priest came

over and interfered with their services. This happened approximately four or five times. Each time there was always some kind of tension, she is talking about Sebastopol and she is responsible for her words.

She cannot tell you the names of the people who were disrupting the evangelization. She believes they were people who represented the official government or had something to do with the government. When she said that these people forcefully interfered with their gathering, she meant they interfered with the proceeding, in a way to prevent it from happening. They were against them, it was not an open war, they were just against them.

She know that this sort of thing happened to other members of the church, but she cannot tell you dates or names. She just knows that it did happen.

If her sister Natalia were to return to the Ukraine, she thinks that she would not find her place and it would have a very negative effect on her life and she would not have any sympathies from the government. She does not think her sister would be able to practice her Pentecostal faith without problem.

Upon cross-examination, the witness testified that she participated in the church services in the last two years approximately three times a week,

maybe more, because they had conversations and shared opinions and had singing rehearsals. They believe in God completely and fully, it is not entertainment, it is not a hobby, it is to live for God, and serve for God, and to give in exchange for eternal life.

For their religion, the go to worship on Sundays. In the last two years, their facility was very poor and they did not have unity with the officials from the government. It does not matter how long their pastor fought to get a new facility, because they did not get it. When asked how many times somebody either from another church, or from the government, prevented them from participating in their Sunday worship service, she stated she personally attended meetings, and there was no situation where she was prevented from attending meetings. These Sunday meetings were never interrupted by Orthodox priests in the last two years.

Another aspect of their faith is to go out and evangelize and bring new people into the faith. They go out and bring the word of the God to the people and bring new people to the church. When she said she had difficulties in the last few years, she meant when she had these difficulties when she was going out and trying to bring new people into the church. The government authorities would allow them to go out and evangelize, but on some occasions they would interfere. The people that came, did everything to prevent everything

from happening. It is not like in an open sense, everything is a conspiracy. When asked what these people did specifically, to interrupt the activities, she stated that while the service was in process, the power would go out.

When asked whether this was a big meeting that required lights and electricity and microphones, she stated that it was a big meeting and it was not like real huge speakers, but there were speakers, and it just happened that they turned off the lights.

Upon questioning by the Court, the witness testified that there was an episode where an Eastern Orthodox priest came and interfered with the service. It is not a secret to anyone that the Eastern Orthodox people want to keep the power in their hands. She affirmed this situation occurred during the tent meeting. When she was asked whether Tatyana had already come to the United States when this happened, she stated the incident with the tent revival occurred when she was in the Ukraine.

ANALYSIS OF FACT AND LAW

This case was remanded from the Board of Immigration Appeals for the purpose of determining in what way country conditions may have changed in Ukraine. The Respondent was also permitted to provide evidence that other

immediate family members had been granted refugee status on the same facts.

In assessing the credibility of the Respondent I have taken into account the rationality, internal consistency, and inherent persuasiveness of her testimony. It is the conclusion of this Court that Respondent has testified in a generally credible manner.

Respondent's claim is centered upon her allegation that she has a well-founded fear of persecution if she returns to Ukraine on account of her religion. Exhibit 2, Addendum. The respondent is a native of the former U.S.S.R., having been born in the country now know as Ukraine. She claims to be stateless. She is also Pentecostal, 51 years old and married. Her husband was deported and currently lives in Russia.

The question is whether there has been a deterioration in the treatment of Pentecostals since the case was decided by the Immigration Judge and affirmed by the BIA. As stated in the Ninth Circuit decision,

> In 01-70762, the State Department reports and the testimony of Volkova's own witness provided substantial evidence to support the IJ's conclusion that country conditions had changed sufficiently to rebut the presumption of well-founded fear of future

persecution that arose when Volkova demonstrated past persecution because of her religion. See Marcu v. INS, 147 F.3d 1078, 1081-82 (9th Cir. 1998). Because she did not make the requisite showing for asylum, it follows that Volkova failed to satisfy the more stringent standard for withholding of deportation. See Ghaly, 58 F.3d at 1429.[8]

The Respondent presented evidence by the pastor of the Respondent's church in the Ukraine. He indicated the Pentecostal church he pastured was not registered with the government because registration was against Biblical truth. He was asked, if he had sought registration, whether the Ukraine government would have granted it. He answered, "Perhaps." He testified that his church's tent meetings were interrupted on occasion. They attempted to put up a tent in a particular section of town. After power was disrupted, certain elders went to the police station. These members had a conversation and negotiations to provide church services. After that, they were able to provide church services. They was permitted to have his meetings on the outskirts of town. Every government, municipal or state, has the right to prevent certain uses of public property. The placing of a tent with a possible large gathering of people can be disruptive to the safety of the public. In this case,

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[8] Ghaly v. INS, 58 F.3d 1425 (9th Cir. 1995).

the church negotiated having church services in another area of town. They were then able to have their meetings. The pastor was asked, if the Respondent were required to return to the Ukraine, would she be able to practice her religion freely. He said he could not tell that. He said the Believers were not free in their beliefs. He was asked about instances of harm his parishioners suffered in the last two years. He testified he did not have a specific example or situation he could relate.

On cross-examination, the pastor testified his church was a member of an association of non-registered churches. He estimated there were approximately 50,000 members of that association. The association has a Bible school to train clergy. In Sebastipol, the pastor had approximately 300 members. In the two years prior to coming to the United States, he said there were not many problems; there were some problems, but not many. He said sometime there were scheduling conflicts for the facility they used and they were not able to provide services. The facility belonged to a factory. If there were elections or something similar event, the church could not meet due to the scheduling of the event. He also mentioned a convention of his association, where a pastor from Georgia talked of problems he was having with the Orthodox Church.

Substantial evidence was presented by the Government that churches are thriving in the

Ukraine. While Eastern Orthodox is still the majority religion, Baptists, Pentecostal, Charismatic, Catholics and other Christian religions appear to be healthy. Exhibit 20. One church report, dated Winter 2002, shows there are 12,090 Orthodox Churches and 9,227 non-Orthodox churches. Exhibit 20, pages 1 and 2.

The Respondent provided the testimony of her sisters regarding their immigration status in the United States. Also, she submitted documentary evidence of their status. See Exhibit 16, pages 37, 42, 46. The sisters all obtained their refugee status through a process in their own country. I have been told that the standards for obtaining refugee status is lower than that for obtaining asylum once in the United States. I recognize the three sisters obtained refugee status under the Lautenberg Amendment. According to the Lautenberg Amendment, individuals within specified categories (Jews, Evangelicals, and certain members of the Ukrainian Catholic or Ukrainian Orthodox Churches), with qualifying relatives in the United States, have had access to the refugee program within the former Soviet Union. Nearly 470,000 individuals have entered the United States as refugees under this program, over 35% of all the refugees admitted since 1989.[29] However, in this case, I must follow the standards

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[2] U.S. State Department, Fact Sheet, Bureau of Population, Refugees, and Migration, Washington, DC, January 16, 2004 – Refugee Admissions Program for Europe and Central Asia

for asylum and withholding of deportation as developed here in the United States. I find that the Respondent has failed to show that country conditions have worsened for Pentecostal Christians in Ukraine since she was denied asylum and withholding of deportation.

The Respondent's testimony has been considered along with the Forms I-589 and the materials submitted by the Respondent and this Court finds that her unwillingness to return does not stem from persecution that she may face in the future on account of any of the five enumerated grounds necessary to a grant of political asylum. The Respondent has failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). The Respondent failed to meet her burden of proof that anyone in Ukraine is interested in her due to any of the five enumerated grounds of asylum. See Section 101(a)(42)(A) of the Act; I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992).

After a careful review of the record, the Court finds that the Respondent's testimony was not sufficient to establish her eligibility for asylum. Inasmuch as the Respondent failed to satisfy the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard of eligibility required for

withholding of deportation. See I.N.S. v. Stevic, 467 U.S. 407 (1984). The evidence does not establish that, if she were now to return to Ukraine, it is more likely than not that she would be subject to persecution on account of one of the five grounds specified in Section 241(b)(3) of the Act.

Accordingly, her application for asylum is denied. It further follows that she has failed the heavier showing required to demonstrate a clear probability of persecution necessary to be granted withholding of removal.

With regard to relief under the Convention Against Torture, the Respondent did not apply for this relief and no evidence was presented to establish the Respondent would be tortured by anyone connected with the Ukraine government, i.e., by, or at the instigation of, a public official or someone acting in an official capacity or with the consent or acquiescence of such an official. Accordingly, with no application for this relief pending and no evidence to suggest this relief in appropriate, the Court determines that withholding of removal under Article III of the Convention Against Torture is not warranted.

Lastly, the previous Immigration Judge granted voluntary departure to the Respondent, but, if the Respondent failed to timely depart, she would be deported to Ukraine, or, in the alternative, to Estonia. The Respondent argues

that she does not have citizenship in Estonia and therefore cannot return there. However, at the time she left Estonia, she was legally registered there. For that reason, I will leave the previous deportation order as it stood in 1997, with the exception, of course, of extending the date for voluntary departure.

In light of the foregoing and after considering all of the testimony and documentary evidence of record, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED THAT Respondent's applications for asylum is hereby denied.

IT IS FURTHER ORDERED THAT Respondent's applications for withholding of removal is hereby denied.

IT IS FURTHER ORDERED THAT the Respondent be granted the privilege of voluntarily departing the United States, without expense to the government, on or before July 19, 2004. This grant of voluntary departure is conditioned upon the Respondent's depositing with the Department of Homeland Security within five business days of the mailing of this Court's decision the sum of $500 or a bond in the amount of $500 to secure her voluntary departure.

IT IS FURTHER ORDERED THAT, if the Respondent should not timely make such a deposit or should otherwise fail to obey this Court's order to depart the United States voluntarily on or before July 23, 2004, the privilege of voluntary departure shall be withdrawn, without further notice or proceedings, and the Respondent shall be removed from the United States to **UKRAINE** on the charges contained in the Notice to Appear. Should the government of Ukraine fails to accept the Respondent, or fails to notify the Attorney General within 90 days that it will or will not accept the Respondent, the Respondent will be deported to Estonia.

IT IS FURTHER ORDERED THAT, if the Respondent should not depart the United States voluntarily on or before July 23, 2004, she shall be subject to a civil penalty of not less than $1,000 nor more than $5,000, and will be ineligible for a period of ten years for any further relief under Sections 240A, 240B, 245, 248 and 249 of the Immigration and Nationality Act, i.e., she will be ineligible for voluntary departure, cancellation of removal, adjustment of status, change of non-immigrant classification or recordation of admission of permanent residence.

Dated: May 24, 2004

/s/
VICTORIA YOUNG
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED January 8, 2008

NATALIA VOLKOVA,

Petitioner,

Cathy A. Catterson,
Clerk
U.S. Court of Appeals
No. 05-74570

v.

INS No. A72-674-520

MICHAEL B. MUKASEY,[10]
Attorney General,

Respondent.

ORDER

Before **D.W. NELSON, BEAM,**** and **RYMER**, Circuit Judges.

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[10] Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

** The Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The panel has unanimously voted to deny petitioner's petition for rehearing. Judge Rymer voted to reject the petition for rehearing en banc and Judge D.W. Nelson and Judge Beam so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.